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No. 94-1248

In the Supreme Court of the United States

OCTOBER TERM, 1994

WILMA O'BRYAN, PARENT AND NEXT FRIEND OF JOHN C. O'BRYAN, AND STATE FARM INSURANCE,

Petitioners,

v.

VOLKSWAGEN OF AMERICA, INC. AND VOLKSWAGEN AG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether this Court, pending the outcome of *Freightliner Corp.* v. *Myrick*, No. 94-286, should hold this petition for review of an unpublished opinion of the Sixth Circuit that reversed a jury verdict on a fact-specific ground that will not be affected by the outcome of *Myrick*.

RULE 29.1 STATEMENT

Respondent Volkswagen AG (VWAG), a corporation organized and existing under the laws of the Federal Republic of Germany, has issued shares that are traded on a public foreign exchange. Respondent Volkswagen of America, Inc. is a wholly owned subsidiary of VWAG and has issued no publicly traded shares.

Other major subsidiaries and affiliates of VWAG in which it has a substantial interest include:

AUDI AG
AUTOGERMA S.p.A.
Autolatina Argentina S.A.
Autolatina Brasil S.A.
Autolatina Commercio, Negocios e Participacoes Ltda.
Coordination Center Volkswagen S.A.
Europcar International S.A.
Financiera Seat, S.A.
InterRent-Europcar Autovermietung GmbH
Seat Leasing GmbH
Seat Motors International B.V.
Seat Kredit Bank GmbH
Shanghai-Volkswagen Automotive Company
Sociedad Espanola de Automoviles de
TAS Tvornica Automobila Sarajevo GmbH
Turismo, S.A.
V.A.G. France S.A.
V.A.G. Financement S.A.
V.A.G. Sverige AB
V.A.G. Transport GmbH & Co. OHG
V.A.G. Bank GmbH
V.A.G. LEASING GmbH
Volkswagen of Nigeria Ltd.
Volkswagen Canada Inc.
Volkswagen Investments Ltd.
Volkswagen International Finance N.V.

Volkswagen Bruxelles S.A.
Volkswagen Audi Nippon K.K.
Volkswagen de Mexico, S.A. de C.V.
Volkswagen of South Africa (Pty.) Ltd.
VOTEX GmbH
VW Credit, Inc.
VW-GEDAS & Co. Projektmanagement OHG

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Volkswagen of America, Inc., and Volkswagen AG respectfully submit this brief in opposition to the petition for certiorari filed in this case.

STATEMENT

This case involves automobile crashworthiness claims for enhanced injuries arising out of a very serious accident in which a 16-year-old, Chad O'Bryan, drove his family's 1987 Volkswagen Jetta off the highway at a speed in excess of the

55 m.p.h. speed limit. After running off the road the car collided with an embankment and rolled over. While inverted and still travelling between 40 and 50 miles per hour, it crashed into several telephone-pole-size logs. One log tore away the windshield pillar on the driver's side and folded the car roof inward, exposing the area where the driver's head normally would be located. The log then shattered the emergency release latch, disengaging the torso safety belt and striking the driver's door frame. As the car continued to rotate, it literally pole-vaulted on the log, generating a longitudinal force on the door frame in excess of 10,000 pounds, which elongated the door opening and unlatched the door. Still in an inverted position, the vehicle fell toward the ground, but before it landed the driver's door opened and O'Bryan was ejected. The vehicle eventually came to rest on top of O'Bryan, who was rendered a paraplegic. Pet. App. 5a-6a.

1. Wilma O'Bryan, Chad's mother (hereinafter "petitioner"), filed this diversity action as parent and next friend, naming as defendants the manufacturer of the Jetta, Volkswagen AG, and its wholly owned American subsidiary, Volkswagen of America, Inc. (hereinafter collectively "Volkswagen"). Petitioner did not contend that any defect in the Jetta caused the accident itself. Instead, she alleged that several defects in the car had enhanced the injuries that Chad suffered during the accident. In particular, petitioner claimed that but for defects in the Jetta's (1) door latch and (2) passive restraint system, Chad would have remained in the vehicle and not suffered the injuries he sustained.

Petitioner's claim of defect in the Jetta's passive restraint system had several components. The vehicle was equipped, among other things, with a two-point belt extending from the driver's right hip to left shoulder, where it was attached to the vehicle's door (so that no affirmative action was needed

to put the belt in place).[1] The emergency release mechanism was located near the door mounting. Petitioner asserted that this design was defective in three respects: (1) the emergency release mechanism should have been located between the two front seats rather than near the door mounting; (2) the belt should have been attached to a motorized track above the door rather than to the door itself; and (3) the Jetta should have been equipped with a manually activated "lap" belt in addition to its automatic shoulder-to-hip belt.

Prior to trial, Volkswagen moved for partial summary judgment on petitioner's manual lap-belt theory. Volkswagen maintained that this particular claim was preempted by the National Traffic and Motor Vehicle Safety Act (hereinafter "Safety Act"), 15 U.S.C. § 1392(d) (recently recodified at 49 U.S.C. § 30103(b)), and Federal Motor Vehicle Safety Standards (FMVSSs) 208 and 209, see 49 C.F.R. §§ 571.208, 571.209. FMVSS 208 granted to automakers the option of choosing from among three occupant restraint system designs in equipping 1987 models. Volkswagen chose to install a two-point passive restraint system with additional features rather than a system that would have included a manual lap belt. The district court granted Volkswagen's motion for partial summary judgment, holding that petitioner's claim based on the absence of a manual lap belt was preempted by federal law. Pet. App. 14a-26a. Petitioner was, however, permitted to introduce evidence of alternative passive restraint designs that included a lap-belt feature.

After trial, the jury returned a verdict of $5,930,499.74 in petitioner's favor, apportioning 85% of the fault to Volkswagen and 15% to Chad O'Bryan. Volkswagen's post-

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[1] The vehicle's passive restraint system also included a specially designed seat (which minimized movement) and a "knee bolster" (designed to absorb and prevent forward movement). Pet. App. 5a.

trial motions were denied, and it took an appeal. Petitioner cross-appealed several pretrial and trial rulings, including the dismissal of her manual lap-belt claim on grounds of federal preemption.

2. A panel of the Sixth Circuit unanimously reversed in an unpublished, *per curiam* opinion. Pet. App. 3a-13a. Based on "a careful review of the record," the court of appeals concluded that petitioner had failed to prove the indispensable element of causation in her design defect claims and that, accordingly, Volkswagen was entitled to judgment notwithstanding the verdict. *Id.* at 4a-5a.

After reviewing the evidence presented at trial, the court of appeals explained that, under Kentucky law, the plaintiff "has the burden of establishing that the circumstances surrounding the accident were such as to justify a reasonable inference of probability, rather than a mere possibility, that the alleged design defects were responsible for the injuries." Pet. App. 10a (citations omitted). Moreover, in advancing "crashworthiness" claims such as those involved in this case, the plaintiff is required not only (1) to "establish[], by competent expert testimony, that the defect was responsible to some degree for enhancement of injury to the plaintiff," but also (2) to present "competent evidence of some practicable, feasible, safer, alternative design." *Id.* at 11a.

The court of appeals held that petitioner failed to satisfy either of these requirements. Petitioner's design defect claims were premised on the theory that if the door latch and passive restraint system had been designed differently, Chad O'Bryan would not have been thrown from the vehicle and would have sustained no (or less severe) injuries. Although "the issue of whether or not O'Bryan would have been injured had he remained in the car was raised, at least superficially, during

the trial," the court explained that it "was never established by competent proof one way or another." Pet. App. 7a. Thus,

> one of the experts called by the plaintiff did testify that O'Bryan would have remained unharmed if he had not been ejected from the car, but this witness stated no basis for his opinion. Given the condition of the roof after the accident and the fact that the Jetta hit the ground at the terminus of its "pole vault" in an inverted position and continued to roll, this assertion appears to have no factual basis. Indeed, one of Volkswagen's experts testified that Chad O'Bryan would have experienced fatal head, brain, neck and chest injuries, based on the circumstances of the wreck and the ultimate condition of the car.

Id. at 12a. See also *id.* at 7a ("[G]iven the fact that one log peeled back the roof of the car and that the car continued to roll after that, it was incumbent upon the plaintiff to prove that he would have been injury-free if restrained in his seat."). Because petitioner "failed to prove causation," *i.e.*, did not prove that the claimed defects in the door latch and passive restraint system caused Chad O'Bryan to suffer any enhanced injuries, Volkswagen was entitled to judgment as a matter of law. *Id.* at 13a.

The court of appeals also held that petitioner failed to present sufficient evidence of a practicable and safer alternative design for either the Jetta's door latch or its passive restraint system. Pet. App. 12a. As for the door latch, petitioner "proposed no alternate design for a more crashworthy door lock, nor did [she] address the possibility that the door opened because the surrounding structure stretched out of contact with the latch mechanism." *Ibid.* And although petitioner's experts "opined that a motorized track or a three-point passive system is 'better' or 'superior,' they failed to establish that a different restraint system would have prevented or diminished Chad O'Bryan's injuries." *Ibid.*

In reversing for failure of proof on causation, the court of appeals did not discuss petitioner's preemption argument. It noted, however, that its disposition of the case "pretermit[s] discussion of those issues raised on appeal that are not directly related to causation." Pet. App. 5a.

3. Petitioner filed a petition for rehearing and suggestion for rehearing en banc. In that document, petitioner in no way suggested that the trial court's preemption ruling had any effect on her ability to submit evidence on the issue of causation (indeed, she made no mention of preemption in the portion of her rehearing petition devoted to causation). Nor did petitioner urge the court to decide the preemption issue. Petitioner did complain, however, about the panel's independent determination that there was insufficient evidence of alternative designs, arguing that the trial court's preemption ruling had impeded her ability to present such evidence. Plaintiff-Appellee, Cross Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc, at 10-12.

In denying the rehearing petition, the panel stated that it had "further reviewed" petitioner's submissions and "conclude[d] that the issues raised in the petition were fully considered upon the original submission and decision of the case." Pet. App. 2a. No judge having requested a vote on the suggestion for en banc rehearing, it too was denied. *Id.* at 1a.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to issue a writ of certiorari to decide whether federal law preempts her common law claim for damages based on the absence of a lap belt in the 1987 Jetta. Pet. 15-23. Alternatively, petitioner asks this Court to hold the petition pending the Court's decision in *Freightliner Corp.* v. *Myrick*, No. 94-286 (to be argued Feb. 22, 1995). *Myrick* involves the issue whether a common law claim for damages based on the absence of an antilock braking device

in a truck is preempted by the Safety Act, 15 U.S.C. § 1392(d) (recodified at 49 U.S.C. § 30103(b)), and by a different Federal Motor Vehicle Safety Standard than is involved in this case.[2] Petitioner's Motion to Defer Consideration, at 1-2. This Court should reject both of petitioner's requests.

To begin with, the court of appeals' decision simply does not present the preemption issue that petitioner asks this Court to review. The Sixth Circuit did not decide the preemption issue. Rather, the court of appeals "pretermit[ted] discussion of th[at] issue[]" (Pet. App. 5a) by holding that petitioner had failed altogether to carry her burden of proof on the issue of causation. This failure of proof was as fatal to petitioner's preempted claim as it was to petitioner's non-preempted claims. In other words, even if petitioner had been permitted to present to the jury her claim that the Jetta's passive restraint system was defectively designed because it lacked a manually activated lap belt, petitioner *still* would have been required to prove that if Chad O'Bryan had remained in the car rather than been thrown from it, he would have suffered less severe injuries. The Sixth Circuit held that petitioner failed, as a matter of law, to make that factual showing. This total failure of proof on causation dooms petitioner's lap-belt claim as well.

Nor is there anything about what the Sixth Circuit *did* decide that warrants further review by this Court. The court of appeals' brief, *per curiam* decision is unpublished. It

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[2] In an *amicus curiae* brief filed with this Court in *Myrick*, the Solicitor General, on behalf of the United States, has distinguished between the preemptive effect of FMVSS 208, applicable here, and the braking standard involved in *Myrick*. See Br. for the United States as Amicus Curiae Supporting Respondents, No. 94-286, at 28-29 ("Interference with that federally protected freedom of choice through state tort judgments would have conflicted with Standard 208.").

creates no conflict with any other court. It does not discuss any legal issue of broad significance (indeed, its discussion of legal issues is limited to Kentucky's law of causation and crashworthiness). And, as just explained, it avoids resolution of the preemption issue highlighted by petitioner by deciding the case on a logically distinct and independently dispositive ground. The court's actual holding rests entirely on conclusions that are highly fact- and case-specific and are controlled by application of established state law.

Petitioner nonetheless contends that this Court's decision in *Myrick* might have some impact on the outcome of this case because "the trial court's erroneous preemption ruling forbade the Petitioner from putting on the very evidence that the court of appeals thought was needed." Pet. 15. More specifically, petitioner maintains that "the trial court summarily prohibited [her] from introducing evidence of other practicable, feasible, safer, alternative designs." *Id.* at 16. See also *ibid.* (stating that "the trial court's preemption ruling prohibited the Petitioner from introducing comparative studies indicating the Volkswagen passive restraint system to be the least effective of all the restraint systems utilized by automobile manufacturers"); *id.* at 17-18 (describing evidence assertedly excluded based on preemption ruling). This argument fails for two reasons.

First, the argument is directed at only one of the two major deficiencies of proof relied on by the Sixth Circuit in ordering judgment as a matter of law for Volkswagen. As discussed above, the court of appeals held that petitioner failed to prove two elements common to all of her design defect claims: (1) that the defect caused some enhancement of the injuries (*i.e.*, that Chad O'Bryan would not have been injured, or would have sustained less severe injuries, had the door latch or passive restraint system kept him in the Jetta), and (2) that there existed "some practicable, feasible, safer, alternative design." Pet. App. 11a. Even if the trial court relied on its preemption ruling in excluding evidence of one

alternative design of the Jetta's restraint system (*i.e.*, a system that included a lap belt),[3] the preemption ruling in no way hindered petitioner from attempting to prove causation. As the Sixth Circuit held, however, petitioner failed to show that if Volkswagen had employed an alternative design that would have kept Chad in the Jetta, he would have been spared the injuries he sustained when thrown from the vehicle. Significantly, petitioner does not contend that the trial court's preemption ruling prevented her from submitting any evidence on the causation issue.

Second, petitioner's rehearing petition in the Sixth Circuit argued at length (at pages 10-12) that it was unfair, in view of the trial court's exclusionary rulings, to hold petitioner responsible for failing to prove the existence of feasible, alternative designs to the Jetta's door latch and passive restraint system. But petitioner did *not* argue that the trial court's preemption ruling had any effect on her ability to prove *causation* or on the Sixth Circuit's resolution of the *causation* issue. In denying rehearing, the panel stated that it had "conclude[d] that the issues raised in the petition were fully considered upon the original submission and decision of the case." Pet. App. 2a. In other words, the court of appeals concluded that petitioner's argument concerning the impact of the preemption ruling on her ability to show alternative designs was simply irrelevant to the outcome of the appeal (because she had failed to prove the independent element of causation). The court of appeals' denial of rehearing after "further review" demonstrates beyond question that even a remand after this Court's decision in

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[3] Despite the trial court's preemption ruling, petitioner was allowed to present evidence of alternative designs incorporating lap belts that might have prevented Chad from being thrown from the car. Pet. App. 7a.

Myrick would have absolutely no effect on the Sixth Circuit's decision.[4]

Because the preemption issue is not presented by the Sixth Circuit's decision, there is no reason for this Court to grant the petition. And because even a reversal of the trial court's preemption ruling would have no bearing on the Sixth Circuit's resolution of this case, there is no reason to hold this case pending the outcome of *Myrick*.

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[4] We note, moreover, that petitioner is plainly mistaken in suggesting that following a favorable ruling in *Myrick* this Court could "rule that the trial court's verdict be reinstated." Motion to Defer Consideration, at 2. The verdict in this case was overturned on causation grounds, and petitioner has not sought review of that determination. Thus, at most, this Court could remand to the court of appeals with instructions to consider whether the precluded evidence on yet another alternative design would alter its decision that petitioner "failed to prove causation." Pet. App. 13a. The court of appeals has decided that fact issue twice already.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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